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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1652

MARTIN HAROLD HODDER, ROWENA E. ROBERTS, KEVIN DONOVAN, LORRETTA DONOVAN, E. GARDNER PRIME, VALERIE PRIME, NATHANIEL ERIC HODDER,
Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and UNITED STATES OF AMERICA,
Respondents,

and

FLORIDA POWER & LIGHT COMPANY,
Intervenor-Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR FLORIDA POWER & LIGHT COMPANY IN OPPOSITION

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BRIEF FOR FLORIDA POWER & LIGHT COMPANY IN OPPOSITION

QUESTION PRESENTED

The Nuclear Regulatory Commission considered the probability of certain types of accidents to be remote and did not require the environmental consequences

of such accidents to be considered in a nuclear power plant construction permit proceeding in the absence of a showing of sufficient probability to warrant consideration. Intervenors opposing the grant of a construction permit made no effort to make such a showing. The question presented is whether the Commission was, nevertheless, required by the National Environmental Policy Act to undertake an analysis of the environmental consequences of such an accident.

STATEMENT

One of the concepts used by the Nuclear Regulatory Commission ("Commission" or "NRC")[1] in its efforts to assure the safety of nuclear power reactors is the "design basis" accident. The Commission requires that any reactor for which a construction permit is sought must be designed and tested against its ability to contain severe hypothetical accidents involving postulated failures of various protective systems simultaneously with the occurrence of the postulated accidents the systems are intended to control. The sequences selected for this purpose are called "design basis accidents."[2] The Commission used this concept in 1971 to help resolve a question posed by the enactment of NEPA:[3] What

[1] "Commission" is used to refer to either the Atomic Energy Commission or the Nuclear Regulatory Commission as the context requires. The AEC's responsibilities for regulating nuclear energy were conferred upon the NRC on January 19, 1975, by virtue of Title II of the Energy Reorganization Act of 1974, 42 U.S.C. § 5841 *et. seq.*

[2] United States Atomic Energy Commission, WASH-1250, THE SAFETY OF NUCLEAR POWER REACTORS (LIGHT WATER COOLED) AND RELATED FACILITIES, p. 2-5 (July, 1973).

[3] National Environmental Policy Act, 42 U.S.C. § 4321 *et. seq.*

types of accidents should be considered to evaluate the environmental risks or costs associated with the licensing of reactors?

The phrase "Class 9 accident" stems from the Commission's response to this question. In 1971 it proposed an Annex—an addition to the Commission's regulations implementing NEPA.[4] The Annex designated classes of accidents according to the likelihood of the occurrence of each class and the consequences of the accident. The "environmental consequences" of each class of accident, other than Class 1 and Class 9, were required to be discussed in the Environmental Report filed by each applicant for a construction permit or operating license.[5] Class 1 accidents were excluded "because of their trivial consequences."[6] Class 9 accidents were excluded for the following reasons:

> The occurrences in Class 9 involve sequences of postulated successive failures more severe than those postulated for the design basis for protective systems and engineered safety features. Their consequences could be severe. However, the probability of their occurrence is so small that their environmental risk is extremely low. Defense in depth

[4] 36 Fed. Reg. 22,851-54 (December 1, 1971) [hereinafter, Annex]. At that time the Commission's NEPA regulations were contained in Appendix D to 10 CFR Part 50. In 1974 the Commission transferred its NEPA regulations to 10 CFR Part 51; but left the Annex unchanged. 39 Fed. Reg. 26,279 (July 18, 1974). The Annex is also reproduced in the "Separate Appendix" to the instant Petition for a Writ of Certiorari [hereinafter, Separate Appendix], pp. 146b-62b.

[5] The provisions of the Annex were also applicable to the Draft and Final Environmental Statement prepared by the Commission pursuant to NEPA. Separate Appendix, p. 148b n.1.

[6] Separate Appendix, p. 149b.

> (multiple physical barriers), quality assurance for design, manufacture, and operation, continued surveillance and testing, and conservative design are all applied to provide and maintain the required high degree of assurance that potential accidents in this class are, and will remain, sufficiently remote in probability that the environmental risk is extremely low.[7]

This classification was not, however, exclusive and did not preclude the use of other accident assumptions demonstrated to be more appropriate. The Annex expressly stated that applicants:

> . . . may substitute other accident class breakdowns and alternative values of radioactive material releases and analytical assumptions, if such substitution is justified in the Environmental Report.[8]

The Annex was issued and continues as a proposed regulation, the Commission having stated that it "expects that the provisions of the proposed amendments will be useful as interim guidance until such time as the Commission takes further action on them."[9]

The Commission's licensing boards have consistently utilized the guidance contained in the Annex, and the decisions of these boards have uniformly been upheld on judicial review. *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 345-48 (1973), *aff'd with repsect to the Class 9 issue sub nom. Aeschliman* v. *Nuclear Regulatory Commission,* 547 F.2d 622, 632 n. 21 (D.C. Cir. 1976), *rev'd on other*

[7] Separate Appendix, pp. 149b-50b.

[8] Separate Appendix, p. 150b.

[9] Separate Appendix, p. 146b.

grounds sub nom. Vermont Yankee Nuclear Power Corporation v. *Natural Resources Defense Council,* 435 U.S. 519 (1978); *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-128, 6 AEC 399 (1973), *aff'd sub nom. Carolina Environmental Study Group* v. *United States,* 510 F.2d 796 (D.C. Cir. 1975); *Wisconsin Electric Power Co., et al.* (Point Beach Nuclear Plant, Unit 2), ALAB-137, 6 AEC 491, 502 (1973); *Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 833-36 (1973), *aff'd by unpublished order sub nom. Lloyd Harbor Study Group* v. *Atomic Energy Commission* (D.C. Circuit No. 73-2266, November 11, 1976), *vacated on other grounds sub nom. Long Island Lighting Company* v. *Lloyd Harbor Study Group,* 435 U.S. 964 (1978); *Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-226, 8 AEC 381, 407 (1974); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 415-16 (1976).

In the *Shoreham* proceeding the Commission's Appeal Board explicitly stated that neither the Annex nor any other Commission issuance precluded a consideration of the environmental consequences of particular accidents. The Appeal Board said:

> 2. In our *Midland* and *Point Beach 2* decisions (ALAB-123 and ALAB-137, respectively, *supra*), we discussed the manner in which the proposed Annex to 10 CFR Part 50, Appendix D, was to be applied in a particular proceeding. First, we pointed out that while the regulation had not been issued in final form, the Commission had authorized its use as an interim guideline. Secondly, we emphasized that the guideline did not close the door to consideration of Class 9 accidents. Rather, while contemplating treatment of those accidents

> in the manner prescribed therein (*i.e.*, as having such a low probability that the environmental risk is insignificant), it did not preclude a party from demonstrating that other assumptions were more appropriate.[10]

The Appeal Board, relying upon the "rule of reason" which governs the proper scope of inquiry required under NEPA, held that the consequences of unlikely events need not be explored.[11] It concluded:

> That description fits the Class 9 accident. In the absence of a showing that, with respect to the reactor in question, there is a reasonable possibility of the occurrence of a particular type of accident generically regarded as being in Class 9, NEPA does not require a discussion of that type of accident. It does not require an impact statement or a licensing board to exhaust all theoretical possibilities, whether or not they have been identified by a party.[12]

The Licensing Board deliberately followed the *Shoreham* precedent in the instant proceeding. On June 5, 1974, while prehearing procedures were being conducted, the opposing Intervenors (Petitioners here) transmitted to the Licensing Board a "proposed refined statement of matters in controversy," contending, among other things, that Florida Power & Light Company (FPL), the applicant for the construction permit, had failed "to consider Class 9 accidents as part of

[10] 6 AEC at 835 (footnote omitted).

[11] The Appeal Board cited *Natural Resources Defense Council* v. *Morton*, 458 F.2d 827 (D.C. Cir. 1972) and *Environmental Defense Fund* v. *Corps of Engineers*, 348 F. Supp. 916 (N. D. Miss. 1972), *aff'd*, 492 F.2d 1123 (5th Cir. 1974).

[12] 6 AEC at 836.

their design basis." On June 18, 1974, FPL filed its comments on the refined statement. It objected to the contention on the grounds that, among others, the Commission's regulations did not require plants to be designed to withstand the consequences of a Class 9 accident, and that no attempt had been made to meet the *Shoreham* test of a "reasonable possibility of the occurrence of a particular type of accident generically regarded as being in Class 9 . . . ." (R. 6836, 6843) [13]

Thereafter, on June 25, 1974, the Commission Staff and the Intervenors in the agency proceeding filed a "Stipulation and Joint Motion" containing a joint statement of the issues those parties thought properly to be in controversy. The document also described issues the Intervenors wished considered, but which the Staff thought should not be litigated. These latter issues included Class 9 accidents, but no specific type of Class 9 accident was described. The document therefore expressed the Staff's view that the issue should not be litigated because there had been "no showing of reasonable possibility" of a Class 9 accident at St. Lucie 2, as required by the *Shoreham* decision. (R. 6948) Florida Power & Light Company concurred in that view.[14] In spite of these repeated reminders of the need to refer to a specific type of accident, Intervenors never attempted to make such a showing. Instead, they replied that:

> . . . having read the Shoreham decision [they] respectfully take exception to that holding in that

[13] "R. —" refers to the administrative record underlying the Commission decision which is the subject of the instant petition.

[14] "Response of Applicant to Stipulation and Joint Motion," dated June 28, 1974, p. 15. (R. 6966)

> the argument supporting the decision does not logically uphold the result.[15]

Consequently, in its "Prehearing Conference Order # 3," dated July 12, 1974, the Licensing Board ruled as follows:

> As to statement on Contention 1.7 (page 12, Joint Motion) Board agrees that there has been no showing of a reasonable possibility of class 9 accident at St. Lucie and therefore an issue relating to a class 9 accident is denied.[16]

The petitioners here excepted to this ruling (R. 19335), but the Commission's Appeal Board upheld it, *Florida Power & Light Company* (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-335, 3 NRC 830, 841 n. 24 (1976),[17] as did the Court of Appeals below. *Hodder* v. *Nuclear Regulatory Commission,* Nos. 76-1709, 78-1149 (D.C. Cir. December 26, 1978).[18]

ARGUMENT

The foregoing establishes that, for clearly stated reasons,[19] the Commission adopted as "interim guidance" the view that Class 9 accidents were "sufficiently low in probability" that their consequences need not ordinarily be addressed in applicants' environmental reports or in the agency's environmental statements. However, the Annex clearly permits, and has been interpreted by the Commission's Appeal Board as permitting, consideration of any particular type of Class 9 accident in the NEPA context if a showing is made that there is a reasonable probability of one occurring with respect to a particular proposed reactor. This approach was followed in the instant proceeding. No showing relative to Class 9 accidents was ever proffered by the petitioners here. Instead, the petitioners restricted themselves to the legal argument that, "having read the Shoreham decision [they] respectfully take exception to that holding."[20] Because the petitioners never attempted to make the required showing, there is no record before this Court on which to make a determination as to any alleged error in this particular licensing proceeding.

There is no conflict of circuits here presented. To the contrary, each time the courts have ruled on this issue they have upheld the Commission. *Carolina Environmental Study Group* v. *United States, supra; Lloyd Harbor Study Group* v. *AEC, supra; Aeschliman* v. *NRC, supra; Porter County Chapter of the Izaak Walton League* v. *AEC,* 533 F.2d 1011, 1017 (7th Cir.), *cert. denied,* 429 U.S. 945 (1976).

Nor is there any important question of Federal law presented. The agency's practice of not considering the environmental consequences of Class 9 accidents ex-

[15] "Intervenors Response to Applicant's Response to Stipulation and Joint Motion," dated July 5, 1974, p. 7. (R. 6985)

[16] Separate Appendix, pp. 8b-9b.

[17] Separate Appendix, p. 88b.

[18] *See,* Petition, p. 4a.

[19] Chiefly, these reasons are "[d]efense in depth (multiple physical barriers), quality assurance for design, manufacture, and operation, continued surveillance and testing, and conservative design. . . ." Separate Appendix, p. 150b.

[20] For this reason the Petition distorts the situation when it states (p. 9): "The Licensing Board thus ruled before the hearing began that petitioners would not be permitted to introduce or question evidence with respect to class 9 accidents."

cept when the suggestion is made that some such accident is not in fact remote, is but a special application of the "rule of reason." This view was expressed by the Court in *Carolina Environmental Study Group* when it stated that consideration is not required of events deemed to be of low probability on the basis of "educated predictions rather than certainties." 510 F.2d at 799. This Court, too, has said that "every alternative device and thought conceivable by the mind of man" need not be considered. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 551 (1978). That view is also incorporated in the recently issued regulations of the Council on Environmental Quality which require discussion in environmental impact statements only of effects which are "reasonably foreseeable." 40 CFR §§ 1502.16(b), 1508.8(b), 43 Fed. Reg. 55,978, 55,996, 56,004 (November 29, 1978).

This is not, as petitioners assert (Petition, p. 17), "a case in which the Commission has refused to consider a class of major nuclear accidents in either rulemaking or licensing proceedings." It is a case in which the agency in fact considered the consequences of accidents it thought credible and, in addition, was willing to consider others upon a showing of a reasonable possibility that they could occur. In this respect the Commission's approach was fully consistent with *Vermont Yankee*. Class 9 encompasses the unlimited universe of all unconsidered accident sequences (other than Class 1). Therefore, like "energy conservation," Class 9 has a "deceptively simple ring" but actually "suggests a virtually limitless range of possible actions and developments . . ." 435 U.S. at 552. In such circumstances, it is wholly within the agency's discretion to require intervenors to make at least some minimal showing

"sufficient to require reasonable minds to inquire further." *Id.* at 554. Indeed, no less is required of them if intervenors are "to structure their participation so that it is meaningful, so that it alerts the agency to intervenors' position and contentions." *Id.* at 553. Petitioners here were never denied the opportunity to make such a showing. To the contrary, they simply refused to do so.[21]

The petition argues (p. 14 n. 20) that the Commission has, in the form of "interim guidance," adopted a rule without following the procedures for rulemaking required by the Administrative Procedure Act. In fact, this guidance did not create a rule of law by the Commission and is expressly exempted from the procedural requirements governing legislative rulemaking under the Administrative Procedure Act. 5 U.S.C. § 553(b)(A). *See also*, United States Department of Justice, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE

[21] The Petition makes repeated reference (pp. 4, 8, 16) to recent events involving the Three Mile Island plant. The complexities of that incident are currently being examined in detail by Executive, Congressional and agency groups. *See, e.g.*, Exec. Order No. 12130, 44 Fed. Reg. 22,027 (April 13, 1979) (announcing the formation of the President's Commission on the Accident at Three Mile Island); Committee on Interior and Insular Affairs, U.S. House of Representatives, *News Release* (May 4, 1979) (creating a task force of Committee members to investigate the accident at Three Mile Island); 44 Fed. Reg. 19,262 (April 2, 1979) (notice of first meeting of the Advisory Committee on Reactor Safeguards (ACRS) Subcommittee on the Three Mile Island Nuclear Station, Unit 2). If appropriate, the Commission, the Executive or Congress will direct action. In any event, this judicial proceeding is not the vehicle for a response to that incident.

PROCEDURE ACT, p. 30 n. 3 (1947).[22] The Petition also argues (p. 17) that "the Commission has refused to consider a class of major accidents in either rulemaking *or licensing proceedings.*" (emphasis added) However, the history of the manner in which the agency dealt with the problem makes it clear that the agency did in fact address the problem in individual adjudications.

The authority of an agency to proceed through adjudication rather than rulemaking is beyond dispute. *NLRB* v. *Wyman-Gordon Company,* 394 U.S. 759, 766 (1969); *SEC* v. *Chenery Corporation,* 332 U.S. 194, 203 (1947). The procedure utilized by the NRC here, in which a Commission statement of policy was used as guidance by subsequent NRC adjudicatory panels but was not "finally determinative of the issues or rights to which it [was] addressed," is fully in accordance with the law. *Pacific Gas & Electric Company* v. *Federal Power Commission,* 164 U.S. App. D.C. 371, 506 F.2d 33, 38-39 (D.C. Cir. 1974), *citing, Columbia Broadcasting System, Inc.* v. *United States,* 316 U.S. 407, 416-17 (1942). It has always been open to the parties here to raise the issue of Class 9 accidents, subject only to a reasonable showing of the type approved by this Court in *Vermont Yankee.* That this opportunity is a real one is underscored by the Appeal Board's decision in

[22] In any case, a review of the petitioners' briefs filed in the Court of Appeals below will disclose that this argument is raised here for the first time and is therefore not properly before this Court. *E.g., Adickes* v. *S. H. Kress and Company,* 398 U.S. 144, 147 n. 2 (1970).

Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194 (August 21, 1978), holding that the discussion of the environmental consequences of a core-melt type Class 9 accident is appropriate in connection with floating (barge mounted) nuclear power plants.[23] Consequently, no violation of the Administrative Procedure Act is presented here.

CONCLUSION

The decision by the Court below, upholding the manner in which the Commission addressed the Class 9 issue in the instant proceeding, is clearly correct. There is no record before this Court which could make review appropriate. The decision sought to be reviewed is in accord with the other relevant courts of appeal decisions. There is no conflict of decisions on the issue with this Court. There has been no violation of NEPA or

[23] However, nothing in that decision indicates an abandonment of the procedures followed with respect to land-based reactors. The opinion stresses that the Annex was prepared with land-based reactors in mind, rather than those afloat. 8 NRC at 219-20. Therefore, the Petition is in error when it states (p. 20 n. 23) that the Appeal Board now adopts petitioners' position on Class 9 accidents.

It should be noted that after issuing the opinion, the Appeal Board certified it for consideration by the Commission. *Offshore Power Systems* (Floating Nuclear Power Plants), ALAB-500, 8 NRC 323 (September 29, 1978). As of this date, the Commission has accepted the case for review (8 NRC — (December 8, 1978)) but has not issued a decision.

of the Administrative Procedure Act, and the decision below does not involve any significant interpretation of either statute.

The petition for certiorari should be denied.

Respectfully submitted,

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